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In the Supreme Court of United States

WM. A. WRIGHT, COMPTROLLER GENERAL,
APPELLANT,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY AND
THE ATLANTIC COAST LINE RAILROAD CO.,
APPELLEES.

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Brief of JOS. B. CUMMING for Appellees.

APPELLEES' STATEMENT OF THE CASE.

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vs.
THE LOUISVILLE & NASHVILLE RAILROAD
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APPELLEES' STATEMENT OF THE CASE.

The Georgia Railroad and Banking Company and the Central Railroad and Banking Company of Georgia were equal owners, as tenants in common, of The Western Railway of Alabama.

May 7, 1881, The Georgia Railroad and Banking Company leased its railroad property, including its half interest in the Western Railway of Alabama, to William M. Wadley and his assigns, for a term of ninety-nine years. By different assignments the appellees have become the lessees, and were such when the tax in question was demanded.

Said Western Railway of Alabama lies in the State of Alabama except one quarter of a mile in the city of West Point, Georgia.

The two above named owners of said Railroad held the same without any charter or act of incorporation until the———day of 188— when they were incorporated by the laws of Alabama under the name of The Western Railway of Alabama Company. The property was divided into 30,000 shares of $100 each, and

each owner received 15,000 of said shares, but the shares received by The Georgia Railroad and Banking Company were covered by said Lease and are enjoyed by the Lessees.

While The Georgia Railroad and Banking Company had leased all its property, the same was returned in its name and by it to the Comptroller General under the laws of Georgia for taxation.

The blanks, annually furnished by the Comptroller General to The Georgia Railroad and Banking Company to be used in making its tax returns, contained amongst others, the following question, to-wit: "Number of stocks and bonds owned by the company and value of all property not enumerated and value of tools?" In no other way than in furnishing these blanks did the Comptroller General make any demand for taxes upon said fifteen thousand shares of stock until about the 25th day of May, 1901, when he specifically demanded of The Georgia Railroad and Banking Company that it pay taxes on said shares of stock for the year 1900 to the State of Georgia, which said taxes so demanded amounted to between $7,000 and $8,000.

It is provided by the aforesaid Lease that whatever taxes are collectible on said stock during the entire term of the lease are payable by the lessees; or if the same are lawfully collected from The Georgia Railroad and Banking Company, the lessees are bound to reimburse said last named company without any deduction from the rent, which said lessees pay.

The stockholders in the Atlanta and West Point Railroad Company, The Georgia Railroad and Banking Company, The Augusta and Savannah Railroad Company and in all corporations, which pay taxes upon their property to the State of Georgia, do not return their shares of stock for taxation.

The corporation, The Western Railway of Alabama, has regularly paid all State and County taxes required of it in the State of Alabama.

The Comptroller General of the State of Georgia, on the failure of The Georgia Railroad and Banking Company to pay taxes for the year 1900 on said 15,000 shares of stock, threatening to issue execution against said Company as the owner of said shares for said taxes, Appellees filed their bill against him and also

against The Georgia Railroad and Banking Company to enjoin the collection, alleging as to the last named defendant that it would either pay the tax and call upon appellees to refund the same, or it would permit the leased property to be taken in execution and sold for payment of the same—and thereupon applied for an injunction against both defendants.

On the hearing of the cause the Circuit Court granted the injunction and made the decree which was appealed from to the Circuit Court of Appeals of the Fifth Circuit—which Court affirmed the judgment of the Circuit Court. The case is now here by writ of certiorari to the Circuit Court of Appeals.

The 10th paragraph of the Petition for Certiorari sets forth the general contention of the State of Georgia thus:

"The contention of the State of Georgia is that since the Constitution of 1877, all property not exempt by that Constitution is taxed, and that the legislature not only has not exempted, but cannot exempt, any item of property, not specifically mentioned in that Constitution; and that inasmuch as shares of stock are property in the holder thereof, separate and distinct from the property of the corporation itself, these shares are taxable to the owner at its domicile, no matter where the property of the corporation may be located."

Let us dissect this general proposition by separating the various sub-propositions which go to make up the whole.

a. All property not exempted by the Constitution is taxable.

b. The legislature has not exempted any item of property not specifically exempted by the Constitution.

c. The legislature has no power to exempt such property.

d. The shares of stock are property in the holder thereof, separate and distinct from the property of the corporation itself.

e. These shares are taxable to the owner thereof, no matter where the property of the corporation may be located.

Appellee can admit allegation b.

Also allegation c.

Also allegation d.

Appellee can admit allegation a, if it is guarded and kept within the bounds of its true meaning and of its territorial limits

by the insertion at the proper places of the words "situate within the State" and "once," so that it will read: "All property situate within the State, not exempt by the Constitution, is taxed once."

Appellee cannot admit allegation e; but on the contrary appellee contends that the domicile of the corporation is, for the purpose of taxation, the *situs* of the stock.

Appellee contends, therefore, that appellant can succeed only by showing:

FIRST, That the property, which he seeks to tax, is situated in the State of Georgia; and SECOND that the tax sought would not be double taxation.

The requirement of the State Constitution in the matter of taxation is fully complied with when any designated property has fairly borne its share of taxation *once*. The Constitution neither requires nor favors double taxation, and such double taxation is no more required by the Constitution when, though double in fact, it is not so technically and may be indirectly enforced, than when it is directly imposed. In a word, the Constitution is satisfied with a substantial compliance with its requirement, and when property has paid its share of tax, the Constitution does not require that same property to be taxed again though under a different name, and though such duplicate taxation is in harmony with a recognized technical right to tax again. The mandate of the Constitution is to tax *everything*: not to tax anything or some things *as often as you can.*

The case most relied on by Appellee for his general proposition as to the universality of taxation, to-wit Atlanta Nat. Assn. vs. Stewart, 109 Ga., 81, does not give any support to the propoistion that there is an *obligation* to impose such duplicate taxation; but *per contra.* See page 98.

DOUBLE TAXATION.

Appellees do *not* contend:

That double or duplicate taxation is illegal: or
That the Legislature of Georgia has *not* the power to tax the

property of a corporation and also the shares, into which the property of the corporation is divided.

The proposition, for which Appellees *do* contend and which, they also contend, controls the case, is:

That no competent authority in the State of Georgia has *in fact* levied a tax on the shares of stock of a corporation in the hands of the shareholders. For the aid, in the way of interpretation, which it gives to the establishment of *this* proposition, the discussion of double or duplicate taxation is entered upon.

The proposed tax, though not technically double taxation, is such practically and substantially, in that it imposes a double burden on the same property and the same real tax payer. The railroad in Alabama is valued at $3,000,000 and fully taxed there. The shares in Georgia are the same $3,000,000. There are not two properties each worth $3,000,000; but a single property worth that sum. This is the substance of the thing.

If the shares are taxed in Georgia, it will be the shareholder who will pay the tax. It is the shareholder who pays the tax levied by Alabama on the property represented by the shares. The tax, wherever and in whatever form paid, is in fact paid by the shareholder. The substantial owner and not the property pays the tax.

Cooley on Taxation, 1289-90.
Burroughs on Taxation, See 7.
Rundell vs. Lakey, 40 N. Y., 513, 517.

The State of Georgia has always and from the earliest times in its history regarded the taxation of both the corporate property and the shares as double taxation.

Bank of Georgia vs. Savannah Dudley's Reports, 132.

The general policy and practice of the State is to tax the corporations and not shares of their stock. The only departure therefrom is in the case of banks; but this departure is made

necessary by the provisions of the National Bank Act, which oblige the State to tax the shares of its own banks in order to be able to get any tax from National Banks within its borders. Having for this reason taxed the *shares*, it leaves the *property* of the banks untaxed.

See Section 12 of Tax Act of 1900.
Acts of 1900, pages 33-34.

Its general policy and practice not to tax *both*, the corporation and the shares, are strongly emphasized by this variation from its general practice in the matter of taxing corporations.

The State, in dealing with domestic corporations generally, demands the return of shares only when the property of the corporation itself is not returned and taxed.

See 33d question of Tax Act of 1898. Acts of 1898, page 36.
See in this connection Rome Railroad vs. Rome, 14 Ga., 275.
Goldsmith, Compl. Gen. vs. Rome Railroad, 62 Ga., 473.

Courts in other jurisdictions take the same view.

Massachusetts. A tax on the real estate of a bank in addition to a tax on shares, whose value is made up in part by real estate, is double taxation.

Tremont Bank vs. Boston, 1 Cushing, 142.

A tax on the Railroad Company's property could not be sustained for the reason that the value of the property thus taxed was included in the value of the shares, which are already taxed.

Middlesex R. R. Co. vs. Charlestown, 8 Allen, 330.

New Jersey. A tax Act exempted from taxation "so much of the property of incorporated companies represented by the capi-

tal stock thereof as by virtue of this Act is taxed in the hands of the stockholders."

HELD that under this Act no property held by the corporation could be taxed: for says the Court "it is perfectly clear that the capital stock in the hands of the stockholders represents the entire property of every incorporated company."

The Belvidere Bank vs. Tunis, Collector, 23 New Jersey L., 546.

MARYLAND. The Tax Act of 1841 made very sweeping provision for taxing all property. Nevertheless assessments made upon the real estate, furniture and fixtures of the bank and houses and lots, which the bank held as proprietor, were set aside, the Court holding that the property of a bank being represented by the shares therein, both cannot be taxed.

"A system of indirect taxes combined with a system of general taxation by value must often have the effect to duplicate upon some species of property and some persons, and the taxation of stockholders in a corporation and also of the corporation itself must sometimes produce a like result."

Cooley on Tax, 3d Ed., 387. See also
Whitworth vs. Tenn., 117 U. S., 136.
New Orleans vs. Houston, 119 U. S., 277.

Counsel for Appellee claim nothing for the foregoing further than that it establishes the proposition that a tax on the corporation for its property and on the shares in the hands of its shareholders is double taxation: that in such a case the one only actual taxpayer, the real and beneficial owner of the property—the shareholder—pays two taxes on one and the same property; and that the State of Georgia recognizes that fact.

"But we make out no conclusive case against a tax when we show that it reaches twice the same property for the same purpose."

Cooley on Tax, 3d Ed., 392-3.

But when we show double taxation, we raise a presumption that the construction of a law, which produces that result, is not the correct construction, and such construction will not be admissible unless required by express words or necessary implication. For "it has been very properly and justly held that a construction of tax laws was not to be adopted that would subject the same property to be twice charged for the same tax, unless it was required by the express words of the Statute or by necessary implication. It is a fundamental maxim in taxation that the same property shall not be subject to a double tax payable by the same party either directly or indirectly: and where it is once decided that any kind or class of property is liable to be taxed under one provision of the statutes, it has been held to follow, as a legal conclusion, that the Legislature could not have intended that the same property should be subject to another tax, though there may be general words in the law which would seem to imply that it may be taxed a second time. This is a sound and very just rule of construction, and it has been applied in many cases where, at first reading of the law, a double taxation might seem to be intended."

Cooley on Tax, 399-400, 3d. E.
Bank of Georgia vs. Savannah, Dudley, 130 (Corporation and Shares of Stock).
Tennessee vs. Whitworth, 117 U. S., 129. (Capital and Shares).
New Orleans vs. Houston, 119 U. S., 277.

Such being the requirements of the law before double taxation can be imposed, it is incumbent upon appellant to show some express enactment imposing a tax on these shares. Such enactment is not to be found in the tax Act of 1898, under which this tax is claimed; for while that act provides in the only section which could have a bearing on this subject, that a tax shall be levied on "all of the taxable property in this State," it is conceded that this provision of the Act, or indeed any other enactment, does not reach shares of stock of domestic corporations. There is quite as much law to tax *them* as there is for the taxation of the shares involved in this litigation.

The claim of the Comptroller General of a right to tax these shares may be stated thus: The Constitution requires all the property in the State, except expressly exempted property, to be taxed. The mandate of the first section of the Tax Act of 1898 "to levy and assess * * * a tax * * * on all of the taxable property in this State" is sufficient "machinery" to bring in all property in this State. These shares are property in this State. *Ergo,* there is law sufficient to tax them.

This argument is just as applicable to the shares of other corporations, which are confessedly not taxed. The Comptroller General, to sustain his claim, is under the necessity of differentiating the *status* of these shares from the *status* of those, which are admittedly not taxed. His position is that the difference is found in the 30th of the questions propounded under the Tax Act of 1898—See Acts of 1898, page 30. Said question is as follows: "How many shares of stock did you own on the day fixed for the return of property for taxation issued by corporations located without this State?"

The position of the Comptroller General on this point in the case may be stated somewhat after the manner of an algebraic problem, thus: The Constitution of the State and the Tax Act of 1898 make up the law applicable to shares in domestic corporations, whose corporate property is taxed. The Constitution of the State and the Tax Act of 1898, plus question 30 of the Act, make up thelaw applicable to shares in foreign corporations whose property is taxed.

Now if the factors common to both propositions, to-wit: the Constitution of the State and the Tax Act of 1898, are eliminated by cancellation, the tax demanded in this case rests alone on question 30.

Double taxation cannot rest on such a foundation. The perversion of a question from its primary function of eliciting information as a basis for further action, and the erection of it into the force of an express enactment, imposing double taxation, is something abhorrent to the well settled principles of strict construction of tax acts generally, and especially as to double taxation.

Besides the general principles which deny to mere questions

such potentiality, an examination of the [illegible]tions, associated in the same category with question 3[illegible] w[illegible] [illegible]ows that it is not entitled to any such high consideration. [illegible]ttention is especially directed in this connection to questions 2, 13 and 42.

UNIFORMITY.

The proposed tax is relatively to the citizens of the State a glaring departure from the rule of uniformity and equal fair dealing, which the letter and spirit of its tax laws enjoin. There is no meritorious reason why the holder of these shares should be taxed and the holder of the shares of the Atlanta & West Point Railroad Company, for instance, should not be taxed. In both instances their relations to their respective corporations are the same. In both instances the tax, if imposed on both, would affect them equally, and, if imposed on one only, would be, to its full extent, an unequal burden.

Now, the uniformity and equality provisions of tax systems are the *citizen's* side of the problem. The Government's concern for itself is to raise a sufficient revenue. Its concern for its *citizens* is to make the burden, so far as practicable, equal and uniform on all. It is for its *citizens* that it devises measures of uniformity and equality.

"Theoretically tax laws should be framed with a view to apportioning the burdens of government so that each *person* enjoying government protection shall be required to contribute so much as is *his* reasonable proportion, and no more. The tax law that comes nearest to accomplishing this is, in theory, the most perfect."

Cooley on Taxation, 1st Ed. 36 Ed.

"Equality and justice are constantly to be aimed at."

Ibid. 322.

III.

THE STATE OF GEORGIA HAS NOT IN FACT TAXED THESE SHARES.

Up to this point I have considered those principles of construction of the laws from which, when applied to the facts of this case, the deduction may be drawn that the State of Georgia has not in fact levied a tax on these shares. I now proceed to point out some direct and positive grounds for [illegible] that the tax has in fact not been laid.

Story: "It would seem to be an axiom that a State has no right to impose taxes upon persons or property beyond the limits of the State; its sovereignty extends no further."

Burroughs on Taxation, Sec. 40

"The true principle on which to declare whether personal property is liable to be taxed is the place of the proprietor."

Dicey on Taxation, page 60

"As to real estate it has never been claimed that such property could be taxed by any State other than that in which it is situated. And the same rule seems to be applicable to personal property; but the difficulties arise in the application of the principle."

Burroughs on Taxation, Sec. 40

Then quoting to the last paragraph of the same section, after stating the general rule to be that choses in action are taxed at their actual situs without reference to the residence of their owner, says that there is some conflict of authority in reference (among other things) to stocks of corporations.

Burroughs on Taxation, Sec. 40

"The power of taxation by any State is limited to persons, property or business within its jurisdiction."

Tappan vs. National Bank, 19 Wall, 490-499.

Authorities might be multiplied indefinitely to show the territorial limitations of the taxing power. The Constitution of Georgia provides for a property tax only on the property within "the territorial limit of the authority imposing the tax." The Tax Act of 1898, under which these taxes are sought, levies a tax only on the taxable property "in this State." Indeed the proposition is axiomatic.

The most obvious subject of taxation by Georgia laws is the real estate situate, lying and being in the State of Georgia. Another obvious subject of taxation by those laws is personal property, having a physical *situs* within the territory of the State, such as animals, vehicles, etc.

Not so obviously, but still unquestionably, *choses in action*, belonging to residents of Georgia, are subjects of taxation by those laws. They (*choses in action*) are incapable of physical *situs*. They are intangible, and the law not having the guide or test of actual physical *situs*, has long since settled arbitrarily that they attach to the person of the owner, and are, in contemplation of law, where the owner is.

Other personal property may have its *situs* in a jurisdiction other than that in which the owner of the property resides. It is then taxable in such other jurisdiction. This rule applies clearly to tangible personal property, such as animals, vehicles and the like, capable of having an actual physical *situs*.

A vital inquiry in this case is to ascertain in what class or category are shares of stock of an incorporated company? Where is their *situs?* Is it with their owner or is it where the corporate property itself is?

Nowhere, I assert with some confidence, are shares deliberately designated *choses in action*. Instances may be found where Courts dealing with the status of other property and not of shares of stock, have used in a general enumeration the phrase

choses in action as applicable to bonds, promissory notes, open accounts, other evidences of indebtedness and shares of stock. In places, also, Courts have spoken of shares of stock as being in the "nature of *choses in action.*" But it is doubted whether any Court has deliberately and on consideration so entitled them. Neither would it seem accurate to say that shares of stock are "intangible." The certificate, which is held by the owner as evidence of his ownership, is in itself not intangible any more than is a deed evidencing the title of an owner to real estate. The property, of which the certificate is the evidence, is certainly not intangible—and herein is a marked difference between "mere *choses in action*" and shares, and the analogy between certificates and deeds very close. Shares of stock seem to be different in some respects from any of the subjects of taxation above mentioned. They are in this respect *sui generis.* According to authority and established principles of law their *situs* can be fixed arbitrarily. Where this has not been done, where, as in the State of Georgia, there is no enactment, direct or indirect, on the subject, a Court, in seeking to ascertain the *situs,* should do so in such a way as to avoid injustice and oppression, which double taxation is admitted to be, though it may be legal. The natural equities and the presumption against double taxation should incline the Court to let even slight legal reasons turn the scale in favor of the tax payer.

No *enactment of the Legislature* of Georgia has ever fixed in Georgia the *situs* of shares of stock held by citizens of Georgia in foreign corporations.

The *courts* of Georgia, so far as they have spoken at all on this subject, have indicated that the *situs* of such shares is in the jurisdiction where the corporate property was located.

Dearing vs. Bank of Charleston, 5 Ga, 497-515.

The case of Wright, Comptroller General vs. the Southwestern R. R. Company, 64 Ga., 784, will be greatly relied on in this argument for establishing the proposition that the non-taxability of the shares in question is not an open question in Georgia; but for the present the case is cited as affecting the question of the

situs of the stock. In effect and by the strongest implication it fixes the *situs* of such shares at the corporation's domicil. It does so when it uses the following language (see page 799:)

"Stock held by the Company in railroads without the limits of the State is not taxable here. Stock in a railroad is really but so many shares of its property, and that property is real estate, for the most part at least, and taxable by the State in which the road is located."

This case is further commented on at this point as furnishing a reply to the position taken by Counsel for the Comptroller General to the effect that the case of Dunbar vs. Augusta, 50 Ga., 392 fixed the *situs* of shares of stock at the domicil of their owner.

The case just quoted from in 64 Ga., after the quotation above made, proceeds to draw the distinction between "bonds, notes and all other mere evidences of debt" on the one hand, and shares of stock on the other. After having just declared that shares of stock in a foreign corporation are not taxable in Georgit, the Court goes on to say that bonds, notes and all other mere evidences of debt "follow the *situs* of the creditor no matter where the debtor lives." For sustaining this proposition the Court cites Dunbar vs. Augusta, supra——thus limiting, in the most unmistakable way, the application of that case to "bonds, notes and all other mere evidences of debt." Indeed even a casual examination of the Dunbar-Augusta case will show that anything said in it about *stocks* is clearly *obiter*. The sole question involved in the case was liability or non-liability to taxation of certain *bonds*, held by Dunbar.

It has been said above that there is no legislative enactment in Georgia fixing the *situs* of shares of stock in an incorporated company. This, however, is not strictly true. The tax act of 1898, under which this tax is demanded, and previous tax acts for many years fix the *situs* of shares of National Banks at the domicil of the bank, although the shareholders themselves may be residents of other States.

In Tappan vs. Merchants' National Bank, 19 Wallace, 490; the Court says on page 499:

"The power of taxation by any State is limited to persons, property, or business within its jurisdiction. Personal property, in the absence of any law to the contrary, follows the person of the owner, and has its *situs* at his domicil. But, for the purpose of taxation, it may be separated from him, and he may be taxed on its account at the place where it is actually located."

Again, speaking of the nature of National Bank shares, the Court says:

"Shares of National Banks are personal property. They are made so in express terms by the Act of Congress under which such banks are organized. They are a species of personal property which is, in one sense, intangible and incorporeal, but the law which creates them may separate them from the person of their owner for the purposes of taxation, and give them a *situs* of their own."

It will be observed that in this case the Court says in effect, in the language first above quoted, that a "law"—not necessarily a statute—can separate such property from the person of the owner and give it a *situs* elsewhere. We claim that there is such "law" in Georgia, and that it is found in the rule of property laid down in 64 Ga. above cited.

In the case of Jellenik vs. Huron Copper Mining Company, 177 U. S., 1, the Court decides clearly and unreservedly that shares in a Michigan corporation, owned by a citizen and resident of Massachusetts, have their *situs* in the State of Michigan.

It is true that this holding of the Court was made on a question of jurisdiction and not of taxation. It is also true that the Court says:

"Whether the stock is in Michigan so as to authorize that State to subject it to taxation as against individual shareholders domiciled in another State, is a question not presented in this case, and we express no opinion upon it." But the reasons given by the Court for fixing the *situs* of the shares for the purpose of

jurisdiction are equally strong for fixing the taxing *situs*. After declaring that the shares are personal property, it uses this language:

"The certificates are only evidence of the ownership of the shares, and the interest represented by the shares is held by the company for the benefit of the true owner. As the habitation or domicil of the company is and must be in the State that created it, the property represented by its certificates of stock may be deemed to be held by the company within the State whose creature it is, whenever it is sought by suit to determine who is the real owner."

Observe that this is substantially the language used by the Supreme Court of Georgia in the Southwestern Railroad case, when it laid down the rule of property as affecting taxation of shares.

Corporations, in a very substantial sense, have possession of the shares—for instance in the matter of transfers—as trustees of the owners of the shares. In cases, too, of judgment against the stockholder, his shares are treated as being with the corporation and are levied on there.

Civil Code of Georgia, Sec. 5430.
See in this connection Civil Code of Georgia, Sec. 4976.
People's National Bank vs. Cleveland, 117 Ga., 908.

III.

THE QUESTION OF THE TAXABILITY OR NON-TAXABILITY OF SUCH SHARES NOT AN OPEN QUESTION IN GEORGIA.

In the case of Wright, Comptroller General vs. The Southwestern Railroad Company, supra, the Court, on page 799, uses this language: "(a) Stock in the company's own road, held by itself, or in other roads in this State, whose charters limit or exempt taxation thereon, and whose income is taxed, is not liable; *and stock held by the company in railroads without the*

limits of this State is not taxable here. Stock in a railroad is really only so many shares of its property and that property is real estate, for the most part at least, and taxable by the State in which the road is located."

But this deliverance by the Supreme Court of Georgia is attacked by the counsel for the Comptroller General on two grounds:

First. It is claimed that it was "a dictum of Judge Jackson," "was c'early not well considered at the time" and "was rendered on the preliminary injunction."

This deliverance of the Court was upon an issue directly made and was in no sense *obiter dictum.* The Court says on page 794:

"The numerous questions made as to different parts of the road and the liability of each portion or branch, most of them dependent for adjudication on separate charters and amendments, and *other questions* in respect to other items of property *in and out of the State and in what degree and how connected with the road and whether liable to be taxed* make the case complicated," etc.

This unanimous judgment of the Supreme Court of Georgia upon a question directly made is also subjected to the novel attack that it was rendered in a "preliminary injunction." This is no valid objection to the decision. The law in an injunction case is most generally settled at that stage of the case. In the case thus attacked the Court says on page 796:

"We think that on the hearing complete relief should be afforded, and the whole matter be investigated *to ascertain precisely what property of the Company should be taxed and what should not be taxed* * * * and in order to facilitate the trial, or a settlement, if desired, before trial, *we will indicate our opinion in regard to these matters now,"* and then proceeds to deliver the above ruling.

It is true that the Court says on page 801: "The views given above are merely indicative of what we now think, from our understanding of *this record as it now appears."* But the Court

also says in conclusion, page 801: "It is ordered that on the hearing the case be tried on its merits, and that such issues be made as shall bring out the whole truth on the facts, and *the law as indicated above be applied to those facts* subject to be modified by the chancellor as *facts other than those in this record* may require."

It is not possible to conceive of authority more direct and unimpeachable for the proposition announced by the Court, viz: *"Stock held by the Company in railroads without the limits of this State is not taxable here."*

The "preliminary injunction" idea would be valuable if Counsel could show that the case went again to the Supreme Court, and that on said second hearing the Court recalled its previous rulings, and that the Comptroller General has in fact taxed the shares, which the Court in this "preliminary injunction" declared to be non-taxable.

Second. But the case of Wright, Comptroller General vs. Southwestern Railroad Company, it is alleged, is no longer authority, for the reason that it was a case decided prior to the Georgia Constitution of 1877.

Though this decision was made in a case originating prior to the Constitution of 1877, the laws relating to railroads, under which laws it arose, were precisely what they are now and have been ever since the Railroad Tax Act of February, 1874. The Constitution of 1877 did not, in the matter of railroad taxation, advance one inch beyond said Tax Act, which has ever remained in force, and is as comprehensive as any Act could be made by the Constitution of 1877. The Constitution added nothing to the stringency and thoroughness of that Act.

Then, as now, the presidents of railroad companies were required to return on oath to the Comptroller General the value of the property of their respective companies, each class to be separately named and valued, to be taxed as other property of the people of the State.

See Tax Acts of 1874-5-6.
Code of 1882, Sec. 826, a.
Code of 1895, Sec. 780.

Then, as now, the law of Georgia regarded shares, representing stock in incorporated companies, holding lands or a franchise in or over lands, as personalty.

Code of 1873, Sec. 2211.
Code of 1882, Sec. 2237.
Code of 1895, Sec. 780.

Again, it is urged by counsel for the Comptroller General that the case of Wright, Comptroller General, vs. the Southwestern Railroad Company, *supra,* was decided at a time when the Legislature of Georgia under its then Constitution could have exempted any property it saw fit to exempt from taxation; but that the Constitution of 1877 has taken that right from the Legislature.

This might be a pertinent argument against the decision if the decision were cited in support of a claim of *exemption* from taxation; but such is not the case. The decision is cited not as declaring or attempting to declare any property in Georgia exempt from taxation, but as laying down a *rule of property,* and declaring what is the *situs* of certain preperty, and as holding, also, incidentally, that the taxation of corporate property, and also the shares representing the corporate property is double taxation.

The case of Atlanta Building & Loan Association vs. Stewart, Tax Collector, 109 Ga., 80, seems to be considered by Counsel for the Comptroller General as furnishing some support to their contention. Why, is not very apparent. That decision announced propositions, not contested by counsel for the appellees, as to the liability of all property *in* the State of Georgia to taxation and as to the impotence of the Legislature to exempt such property from being taxed one time. But as to one of the controlling questions, viz.: *situs,* it is silent, and not at all in conflict with previous Georgia authorities: while on another controlling question, that of the taxation both of corporate property and the shares, into which it is divided, its deliverance, so far as it makes any, is in favor of the contention of these appellees, when it says: "Possibly it may be competent to provide

against taxing the shares of stock, where all the property which gives them value, has been taxed." But the Court then proceeds to declare that the decision is not to be taken as authority for or against that proposition. Indeed, this decision has no bearing on the case at bar. It is properly disposed of by the learned judge of the Circuit Court, from whose judgment this appeal is taken. After quoting the first two head notes of the decision, Judge Newman says:

"What is thus stated in the head notes, and more elaborately in the opinion, is beside the exact question involved here, which is, whether the State, for purposes of taxation, treats the shares in a railroad corporation as property, distinct and separate from that of the corporation which it represents. Unquestionably the effect of the decision of the Supreme Court of the State in Wright, Comptroller General General vs. Southwestern R. R. Co. *supra,* is that the State does not so regard shares of stock in railroad corporations located without the State.

"There is nothing whatever in this decision to the effect that the State treats shares of stock in corporations as separate and distinct from that of the corporation for purposes of taxation, when the corporation itself is taxed on the property which the shares represent."

Since the argument and decision of this case in the Circuit Court of Appeals, and since the Petition to this Court for Certiorari, the case of Wright, Comptroller General vs. The Southwestern Railroad Company, 64 Ga., 783—the case so vigorously assailed in the Brief of Counsel for Appellants, and in their Petition for Certiorari as being "not well considered" and as dealing with a condition of law, which was radically changed by the State Constitution of 1877—has been before the Supreme Court of Georgia and has been mentioned approvingly by said Court. This mention has not been casual, without consideration, or in any sense *obiter;* on the contrary the case is cited as direct authority for the proposition that the *situs* of shares of stock in a corporation is at the domicile of the corporation itself. That was the vital question in the case to-wit: Peoples' National Bank vs. Cleveland, 117 Ga., 908, decided April 8, 1903. In

this Cleveland case the Supreme Court of Georgia quotes the exact language of the decision in Wright vs. Southwestern Railroad Company *supra,* as follows:

"Stock in a railroad is really but so many shares of its property, and that property is real estate for the most part at least, and taxable by the State in which the road is located."

Whatever argument may have been made with some show of reason in the earlier stages of this cause against the authority of the Southwestern Railroad Company case, such argument is now out of the question.

SOME DISCUSSION OF THE CASE OF KIDD VS. ALABAMA, 188 U. S. 730.

The decision in this case is limited strictly to the contention of the Plaintiff in Error, which was that if foreign stock was considered by the laws of Alabama to be, by a fiction, present in Alabama for the purpose of taxation, it must be treated as present also for purposes of protection.

The "protection" sought was to be put on the same footing in the matter of taxation as domestic stock.

Limited to that narrow contention, to-wit: that the stock is taxed on the fiction of its presence, the Court holds that the claim of unequal protection of the laws is unsustained. The Court seems to say in effect that for all that appears the shares in this instance may have been taxed for the same reason that some domestic stocks were taxed, viz: because the property and franchise of the corporation are untaxed.

The Court says the argument for the taxpayer would have had more logical force, if he had denied the right to tax foreign stocks at all—though the Court adds: "We are far from implying that it would have been unaswerable or that it can be regarded as open."

The Court says on page 732: "The real grievance in a case like the present is that more than probably they are taxed elsewhere."

Further on the Court says: "No doubt it would be a great advantage to the country and to the individual States, if principles of taxation could be agreed upon which did not conflict with each other, and a common scheme could be adopted by which taxation of substantially the same property in two jurisdictions could be avoided."

As legal authority Kidd vs. Alabama simply decides:

1. That a State may adopt the fiction that shares of stock held by its citizens in a foreign corporation are present at his domicil.

2. That with or without that fiction a State has *the power* to tax such shares. It does not in any degree weaken the position of Appellants, to-wit: that the State of Georgia has never adopted that fiction, but, on the contrary, has expressly denied it through her courts, early and late.

Wright, Comptroller General vs. The Southwestern R. R. Co., 64 Ga., 783.
Peoples' National Bank vs. Cleveland, 117 Ga., 908.

On the other hand, Kidd vs. Alabama gives all its weight to the support of Appellant's contention that the proposed taxation is in effect and substance double taxation and subject to the rules of construction and the consideration of right and justice applicable to double taxation.

Jos. B. Cumming.